75-1483

Supreme Court, U. S.
FILED
MAY 13 1976
MICHAEL RODAK, JR., CLERK

No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1975

CITY OF CHICAGO, a municipal corporation,
Petitioner,

v.

KENNY CONSTRUCTION COMPANY, a corporation, S. A. HEALY COMPANY, a corporation, and JAMES McHUGH CONSTRUCTION COMPANY, a corporation d/b/a KENNY-HEALY-McHUGH, a joint venture, and ROYAL INDEMNITY COMPANY, a corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS, KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, IN OPPOSITION

O'KEEFE, ASHENDEN & LYONS
One First National Plaza
Suite 5100
Chicago, Illinois 60603

JAMES F. ASHENDEN, JR.
THOMAS G. LYONS
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
I. The Petitioner is precluded from raising issues in its Petition which it waived by not raising in either the District Court or the Court of Appeals	7
II. The Federal anti-injunction statute does not prohibit a district court, exercising diversity jurisdiction, from protecting or effectuating its judgment order by restraining parties to a declaratory judgment from relitigating the same issues in a state court proceeding	9
III. Neither the district court nor the court of appeals erred in refusing to extend the indemnity provisions of the subway construction contract to include the sewer and water line relocation by the City	13
Conclusion	16

List Of Authorities Cited

Atlantic Coastline R.R. Co. v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970)	12
Duignan v. *United States, et al.,* 274 U.S. 195 (1926)	7
Huffman v. *Pursue, Ltd.,* 420 U.S. 592 (1975)	10
International Association of Machinists and Aerospace Workers v. *Nix,* 512 F. 2d 125 (5th Cir. 1975)	12

PAGE

McCullough v. *Kammerer Corp., et al.*, 323 U.S. 327 (1945) 8

Nice Ball Bearing v. *M. H. Lescure*, 227 F. 2d 118 (7th Cir. 1955) 14

Silber v. *United States*, 370 U.S. 717 (1962) 7

State of Oklahoma ex rel Wilson v. *Blankenship*, 447 F. 2d 687 (10th Cir. 1971) 12

United States v. *Seckinger*, 397 U.S. 203 (1969) 14

Younger v. *Harris*, 401 U.S. 37 (1971) 10

STATUTES

28 U.S.C. 2201 11

28 U.S.C. 2283 ..... 8, 9, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-14853

CITY OF CHICAGO, a municipal corporation,

Petitioner,

v.

KENNY CONSTRUCTION COMPANY, a corporation, S. A. HEALY COMPANY, a corporation, and JAMES McHUGH CONSTRUCTION COMPANY, a corporation d/b/a KENNY-HEALY-McHUGH, a joint venture, and ROYAL INDEMNITY COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS, KENNY CONSTRUCTION COMPANY, A CORPORATION, S. A. HEALY COMPANY, A CORPORATION, AND JAMES McHUGH CONSTRUCTION COMPANY, A CORPORATION d/b/a KENNY-HEALY-McHUGH, A JOINT VENTURE, IN OPPOSITION

The Respondents, Kenny Construction Company, a corporation, S. A. Healy Company, a corporation, and James McHugh Construction Company, a corporation,

d/b/a Kenny-Healy-McHugh, a joint venture, (hereinafter called "Joint Venture") respectfully prays that this Court deny the prayer of the Petitioner, City of Chicago, a municipal corporation, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding December 15, 1975 (rehearing denied January 15, 1976).

OPINIONS BELOW

The opinion of the Court of Appeals, filed on December 15, 1975, is reported at 528 F. 2d 184 and is reproduced in the Appendix to the Petition for a writ of certiorari. Similarly, the order of the Court of Appeals denying the Petition for Rehearing on January 15, 1976 is reproduced in the Appendix to the Petition.

The findings of fact and conclusions of law of the District Court, entered on June 7, 1974 are unreported but are reproduced in the Appendix to the Petition. Similarly, the Judgment of that Court is unreported but reproduced in the Appendix to the Petition.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has set forth five questions in its brief. In addition, the following questions present themselves:

1. Whether an issue not raised in either the District Court or the Court of Appeals may properly be raised in the Supreme Court.

2. Whether a District Court, in the exercise of its diversity jurisdiction, may in a Declaratory Judgement

Action, restrain parties before it from relitigating in state courts issues determined by it in order to effectuate or protect its judgment.

STATEMENT OF THE CASE

Petitioner's statement of the case is essentially correct. However, certain additional facts are necessary.

This action arose as a response to the filing of several state lawsuits alleging that the Petitioner, City of Chicago, and the Respondent Joint Venture had caused damage to their property during the construction of the Milwaukee Avenue Subway. Royal Indemnity Insurance Company (hereinafter called "Insurance Company"), being a New York corporation, filed the instant action in U. S. District Court for the Northern District of Illinois seeking a determination as to whether the damage complained of by the property owners and the activity resulting in that damage were covered under the policy of insurance issued to the Joint Venture. As Defendants, the Insurance Company named the Joint Venture, the City and the Plaintiff property owners in the state cases.

Thereafter, the City filed a counterclaim in the instant case against the Insurance Company alleging that if the City employees caused the damage complained of in the State cases, then by virtue of the indemnity agreement between the City and the Joint Venture in Contract K-4, and the indemnity provision in the insurance policy, the City was entitled to coverage by the Insurance Company. Also, in the instant case, the City filed a cross-claim against the Joint Venture alleging that even if the City caused the damage, then by virtue of the indemnity provision, the City was entitled to indemnification from the Joint Venture.

The City's theory of the case in its cross-claim in the instant lawsuit was the same as it filed against the Joint Venture in the State cases. Thus the city, by its own action in filing the cross-claim and the counterclaim put at issue in the Federal tribunal the issues of indemnity.

In its petition, the City has deliniated certain provisions of Contract K-4, but omitted the following:

> "Other Contracts
>
> "The City may undertake or award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and City employees and carefully fit his own work to such additional work as may be directed by the Commissioner. The contractor shall not commit or permit any action which will interfere with the performance of work by other contractors or by City employees."

Pursuant to this provision, the City undertook to perform itself the relocation of the sewer and water lines. This relocation construction is referred to in the contract documents under the legend "work by others". There is no support in the record for the City's statement in its Petition that the Joint Venture and the City agreed that the relocation work was necessary, and further agreed that the City would undertake the work. No such testimony was ever adduced. The City unilaterally decided to undertake the relocation work itself under the above cited provision of the Contract. At no time did the City ever consult with, much less agree with, the Joint Venture on either the City's decision to relocate the lines itself, or the placement of those lines in the sidewalk areas.

At no point in the contract documents is the relocation construction specified or described except for the

symbols and legend "work by others". The actual blueprints and working drawings for both the sewer and water relocations were contained in City drawings made by City engineers and used by City employees. The Joint Venture had absolutely nothing to do with the relocation of the lines since Contract K-4 had nothing to do with the relocation of those lines.

The City forces, in relocating the sewer lines, undertook to excavate trenches in the sidewalk area of Milwaukee Avenue. These trenches varied in depth to a level of 12 feet and a width of six feet. The excavations were, in some cases, immediately adjacent to building foundations and were undertaken without any shoring designed to maintain the lateral support of the buildings.

During the time the City was excavating its trenches for the relocation, several of the buildings along the City construction site began to settle. One of the buildings, the property of one Lanski, a Plaintiff in a state case, suffered a cave-in of soil underlying its foundation while the City was excavating its sewer trench so close to the building that its foundation was exposed. The subsidence continued during the time the Joint Venture undertook its main excavation.

Contrary to statements in the City's petition, the Joint Venture completely shored its excavation. The construction procedure required by the contract and followed by the Joint Venture called for the erection of "soldier pile line". Briefly, this technique called for the contractor to auger a series of holes twenty feet apart along the construction right of way. Into these holes, "I" beams were placed, and concrete was poured to solidify the beam in place. After the street was broken up, the Joint Venture would then backhoe to a depth of

2½ to 3 feet. Metal sheeting and timbers were placed laterally from "I" beam to "I" beam before any further excavation was undertaken. At all times, the Joint Venture shored and braced its excavation. The effect of this shoring was to construct a retaining wall that supported the adjacent soil, protected the men working in the excavation, and maintained the structural integrity of adjoining properties.

During the course of the Joint Venture's excavation, the sublateral soil integrity was maintained throughout, and in the testimony of the only expert offered at the trial by any party, this excavation did not contribute to the subsidence affecting the structures along the right of way. The only expert testimony on this issue concluded that the sole cause of the damage to the buildings complained of in the state cases was the sewer and water relocation work performed by the City. The expert further stated that there was no causal connection whatsoever between the building's subsidence and the Joint Venture's excavation work.

ARGUMENT

I.

THE PETITIONER IS PRECLUDED FROM RAISING ISSUES IN ITS PETITION WHICH IT DID NOT RAISE IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

In this Court, the City seeks to raise for the first time the propriety of the District Court's enjoining certain defendants from proceeding against the Joint Venture in state court proceedings. At no time did the City raise this issue in the District Court either by means of a motion or in any other manner. Neither did the City assign the issuance of the restraining order as error to the Court of Appeals, nor was the issue briefed or argued in that Court.

It is a fundamental principle, repeatedly declared, that this court will not entertain issues not raised in the Court of Appeals. The City should not be heard now to urge any issue that was not presented in any form either to the District Court or to the Court of Appeals. In *Duignan* v. *United States, et al.,* 274 U.S. 195 (1926), this Court stated "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed." (274 U.S. 200). What constitutes an "exceptional" case is discussed in *Silber* v. *United States,* 370 U.S. 717 (1962). That case points out that this Court can always notice "plain error". The Court also stated that "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or

if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." (370 U.S. 718). Certainly, no such situation is presented to this court by the City's urging in its petition a violation of the Federal Anti-Injunction Statute (28 USC Sec. 2283).

Indeed, in *McCullough* v. *Kammerer Corp., et al.,* 323 U.S. 327 (1945), this court dismissed a Writ of Certiorari which it had previously granted because "the grounds asserted for the allowance of certiorari are inadequately supported by the record." This was true, the court said, because "the only question for which we granted certiorari is one not properly raised, litigated or passed upon below" (323 U.S. 328). The same circumstances obtained in the instant case. The City seeks to raise for the first time in the Supreme Court of the United States an issue never discussed in any form whatever in any forum below. As will be seen in our later discussion of the Anti-Injunction Statute, the trial court's action was perfectly proper. But it is a cardinal principle in appellate jurisprudence that the trial courts and intermediate Courts of Appeal should have an opportunity to pass on all issues. The Anti-Injunction Statute point certainly does not constitute plain error in any case and, indeed, in the instant case, the issuance of the injunction by the trial court did not constitute error at all.

The City should not be heard to assert this issue in this court for the first time.

II.

THE FEDERAL ANTI-INJUNCTION STATUTE DOES NOT PROHIBIT A DISTRICT COURT, EXERCISING DIVERSITY JURISDICTION, FROM PROTECTING OR EFFECTUATING ITS JUDGMENT ORDER BY RESTRAINING PARTIES TO A DECLARATORY JUDGMENT FROM RELITIGATING THE SAME ISSUES IN A STATE COURT PROCEEDING.

The City argues in its petition that the Federal Anti-Injunction Act, 28 USC Sec. 2283, is violated by those provisions of the judgment order in this case which restrained certain of the parties from proceeding to relitigate their claims in a state court. The section reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, *or to protect or effectuate its judgments.*" (Emphasis supplied)

Apparently, the particular provisions complained of by the City are as follows:

> "4. The Defendant, City of Chicago is ordered to forthwith dismiss its counterclaim filed on April 25, 1972 in the Circuit Court of Cook County and now pending there as case No. 69 CH 1823.
>
> 5. Cross-Plaintiff, City of Chicago, is hereby restrained and enjoined from filing or maintaining any counter-claim, cross-claim, or other action for indemnity against Kenny Construction Company, S. A. Healy Company, James McHugh Construction Company, individually or d/b/a Kenny-Healy-McHugh, a joint venture, under the provisions of contract K-4 in any of the litigation now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof.

7. The additional defendants herein named as Plaintiffs in the underlying lawsuits mentioned in paragraph 1 hereof are hereby restrained and enjoined from proceeding against Kenny Construction Company; S. A. Healy Company and James McHugh Construction Company, individually or d/b/a Kenny-Healy-McHugh, a joint venture, in any of the lawsuits now pending in the Circuit Court of Cook County, Illinois, as recited in paragraph 1 hereof, and said additional defendants are hereby further restrained and enjoined from making any claims or instituting any further lawsuits against said contractors and/or joint ventures growing out of the work performed by the City which caused the damages complained of in the underlying lawsuits, if any."

The City's petition concludes that the above portion of the District Court's judgment order is prohibited by Sec. 2283 as interpreted by this Court in *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975). We believe that the City's reliance thereon is misplaced. Section 2283, as noted by this Court in both *Younger* and *Huffman,* provides that a Federal court may not enjoin a state court proceeding unless one of the three statutory exceptions is met. In addition to these statutory exceptions, *Younger* established, in criminal cases, the irreparable harm test as an additional jurisdiction exception to Section 2283. This test was later extended to civil cases in *Huffman.* Since this case rests within the ambit of the statutory exception "to protect or effectuate its judgments", the irreparable harm test expressed in *Younger* and *Huffman* should not control the consideration of this case. Nor is the principle of comity affronted by the restraining order here. Section 2283 clearly enables a Federal court to protect or effectuate its judgments by means of an injunction, if necessary. The City's suggestion that the District Court in this case was precluded from

enforcing its order by means of an injunction against a state court proceeding is not only contrary to the statutory provisions of Section 2283, but the adoption of the City's argument would emasculate the efficacy of that Federal court's decision for all practical purposes since identical issues were pending in the underlying state cases.

The instant case was originally filed by the respondent insurance company seeking a determination as to the question of coverage or non-coverage under a policy of insurance pursuant to the Federal Declaratory Judgment Act in 28 U.S.C. Sec. 2201. Its complaint stated that the joint venture failed to abide by the provisions of the insurance contract by causing or allowing damage to buildings along the construction site without taking steps to arrest or correct the damages. Thereafter, the City filed a cross-claim against the Joint Venture seeking indemnification for any damage caused by the City. It also filed a counter-claim against the insurance company seeking coverage as an "additional insured" for damage it caused, or, in the alternative, for coverage under the "indemnity provisions" of the insurance policy. Naturally, a necessary element in any determination of the indemnity questions required a previous determination as to who caused the damages. As will be seen, this question was resolved against the City.

Thus, it was the City which put at issue the question of who caused the damages, as well as the indemnity points. At the conclusion of the proofs, the Court ruled that all of the damage alleged in the state court cases was caused by the City, that the City's work in relocation was not part of contract K-4, and, thus, the City was not entitled to indemnification by the Joint Venture for the City's negligence.

The "restraining" provisions of the District Court's order simply sought to insure that its findings would not be relitigated in the pending state cases, where issues identical to those determined by the District Court were also pending.

As we have seen, Sec. 2283 of Title 28 U.S.C. specifically excepts from general prohibition against enjoining state court proceedings injunctions issued by a Federal Court "in aid of its jurisdiction, *or to protect or effectuate its judgments.*" This relitigation exception has been recognized by the Court of Appeals in two circuits, *International Association of Machinists and Aerospace Workers* v. *Nix,* 512 F. 2d 125 (5th Cir. 1975) and *State of Oklahoma ex rel Wilson* v. *Blankenship,* 447 F. 2d 687 (10th Cir. 1971). In addition, this Court, by implication, has recognized this theory in *Atlantic Cost Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S. Ct. 1793, 26 L.ed. 2d 234 (1970).

The purpose of this exception is to insure that parties who successfully maintain an action in a federal tribunal will not be subject to a relitigation of the same issue in a state court with the attendant possibility of a different result. The determination that the Joint Venture caused no damage and that the City caused all of the damage was a necessary finding in order to reach the declaration of rights under the insurance policy issued by the court below. Certainly, a Federal court is entitled to make certain that the successful parties before it will not be subject to a relitigation in a state tribunal of issues decided by that Federal court. Similarly, the trial court's determinations with respect to the indemnification issue should not be capable of relitigation in a state court. A Federal court should and does have the power to insure

the integrity of its decisions by means of an order restraining parties from relitigating its orders and determinations in a state court.

There is thus presented in the instant case a classic illustration of the wisdom displayed by the Congress in incorporating into Section 2283 the exceptions that it did. The injunction issued by the trial court in the instant case was clearly issued by that court in order "to protect and effectuate its judgments". Section 2283 was certainly not violated by the issuance of that injunction. Indeed, both the letter and spirit of the section in its entirety were wholly complied with.

III.

NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS ERRED IN REFUSING TO EXTEND THE INDEMNITY PROVISIONS OF THE SUBWAY CONSTRUCTION CONTRACT TO INCLUDE THE SEWER AND WATER LINE RELOCATION BY THE CITY.

The District Court and the Court of Appeals, in reaching their respective determinations as to whether the indemnity provision of contract K-4 would operate to entitle the City to be held harmless for its negligence in relocating city sewer and water lines, were faced with two fundamental questions. These were:

1. Was the relocation work part of the subway contract and therefore included in the indemnity risk of the contract?

2. If so, is the indemnity language enforceable?

From the onset of the litigation in this matter, the City has steadfastly maintained that the relocation project was a part of the contract, and that the language of in-

demnity was broad enough to include the City's negligence in relocation. To date, both the District Court and the Court of Appeals have concluded as a matter of law that the relocation work was without the subway contract and that the City is therefore not entitled to indemnification.

Since this issue presented a question of contractual interpretation, the Court of Appeals determined the intent of the parties from an examination of the entirety of the contract. *United States* v. *Seckinger,* 397 U.S. 203 (1969). *Nice Ball Bearing* v. *M. H. Lescure,* 227 F. 2d 118 (7th Cir. 1955).

In doing so, the Court noted that the sewer relocation work was not specified in the contract documents, but only appeared under the legend "work by others". In addition, the price for the sewer work was not included in the bid. Thus, the Court concluded that the relocation work was specifically excluded from the subway contract. This being so, the City's negligence was therefore not covered by the contract's indemnity provision either as to the Joint Venture or the Insurance Company.

The Court then considered the City's assertion that the indemnity language was broad enough to cover the City's negligence both within and without the contract. In relying on the "other contracts" provision, which enabled the City to either reserve work not covered by the contract or to grant other contracts, the Court concluded that the City was a collateral contractor, and that the contract did not intend to expand the indemnity provision to collateral contractors. Certainly, the City could not possibly be serious in contending that the contract language provided for the Joint Venture to indemnify the City for the negligence of all collateral contractors. As

noted by the Court of Appeals, such a conclusion "would obviously be absurd".

Since the Court decided that the contract does not include the sewer work, and that perforce its indemnity provisions did not cover such work, the court never reached the question of the enforceability of the indemnity language. With the case having been fully adjudicated by the decision on the scope of the contract, the court did not need to address itself to any further issues. But the City's petition discusses at length certain Illinois authorities on the enforceability of indemnity provisions which are thus outside the pale of this case.

Whatever may be the Illinois law on such indemnity provisions, it is not applicable or even relevant here because the courts below have determined that the contract containing the indemnity provisions which the City is at such pains to discuss in its petition did not embrace the work which caused the damages complained of originally. Thus, the City's assertion that the courts below misapplied the Illinois law on enforceability of indemnity provisions in a contract finds no support in the record. It could not, since the courts below were not even required to pass on the question and did not, in fact, do so.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES F. ASHENDEN, JR.
THOMAS G. LYONS
Attorneys for Respondent Joint Venture

O'KEEFE, ASHENDEN & LYONS
One First National Plaza
Suite 5100
Chicago, Illinois 60603
263-3300